IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11970 of 2003
with
CIVIL APPLICATION NO.7415 OF 2003

AND

SPECIAL CIVIL APPLICATION NO. 11972 OF 2003
WITH
CIVIL APPLICATION NO.7417 OF 2003

AND

SPECIAL CIVIL APPLICATION NO. 12419 OF 2003
WITH
CIVIL APPLICATION NO.7416 OF 2003

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHORANIYA RAFIQBHAI DAWOODBHAI

Versus

KHORAJIYA SOYABHAI SULEMAN

Appearance:
1. Special Civil Application No. 11970 of 2003
MR PK JANI, Advocate for Petitioners
MR SANJAY M AMIN, Advocate for Respondent No. 1
MR MS RAO, AGP for Respondent No. 2
RULE SERVED BY DS for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 16/10/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These three petitions raise identical issues against the impugned decisions of the Election Tribunal setting aside the result of the elections to the three wards in question of Bhilvan Gram Panchayat on the ground that the nomination papers of the respondent - candidates were wrongly rejected and directing the elections to the said wards to be held afresh by accepting their nomination papers, and further directing that the election to the office of Upa-Sarpanch of the Panchayat should not be held until the candidates elected from these three wards were able to participate in such election.

2. In Special Civil Application No.11970 of 2003, the returning officer, by his order dated 20th March 2002, informed the respondent No.1, who had filed his nomination as a candidate for membership of the Village Panchayat from Ward No.6 that his nomination paper was rejected on 19-3-2002 as he did not state the number of the ward therein. Even in Special Civil Application No.11972 of 2003 also, similar communication sent on 20th March 2002 was sent by the Returning Officer to the respondent No.1, stating that upon scrutiny done on 19th March 2002, the ward number stated in the nomination form was incorrect when checked in the voters' list and therefore, his nomination form was rejected under Rule 12 of the Gujarat Panchayat Election Rules. In Special Civil Application No.12419 of 2003, the nomination form of the respondent No.1 was rejected on the ground that the name of the respondent No.1 was at Srl.No.73 in the voters' list but the proposer of the respondent No.1 had not stated the correct serial number and her name was

shown at Srl.No.103.

3. Against the rejection of their respective nomination forms during scrutiny which was made on 19th March 2002, the concerned candidates who are respondent No.1 in these three petitions, challenged the communications of the Returning Officer informing them about the rejection of their nomination forms under Rule 12 of the said Rules before the Civil Judge [S.D.] Patan in Election Petitions Nos. 4/2002, 5/2002 and 6/2002 under Section 31 of the Gujarat Panchayats Act, 1993. The learned counsel for both the sides have argued these three petitions by referring to the record of the Special Civil Application No. 11970 of 2003.

4. The Election Tribunal held in all the three matters that the Returning Officer had not taken proper care during scrutiny of the nomination forms of these candidates and that if reasonable care was taken in scrutinising the forms, the Returning Officer would not have rejected their forms. It was observed that, from the papers on record, the Returning Officer would have known that the omission of number of the ward or erroneous mention of the serial number of the candidate were only technical lapses on the basis of which the election forms could not have been rejected. Moreover, though all these three candidates were present throughout the day on 19th March 2002 before the Returning Officer, the Returning Officer did not bring the errors to their notice. It was held that the Returning Officer had, thus, committed breach of the guidelines and instructions issued to him which required him to bring such technical errors in the nomination papers to the notice of the concerned candidates. Issues Nos. 1 and 2 were accordingly decided by the Election Tribunal against the petitioners. On issues Nos. 3 and 4, the Election Tribunal held that the Election petitions were not barred by limitation, nor were they barred by res judicata and on these issues, the Tribunal's decision has not been questioned by the learned counsel for the petitioners in these petitions and he has confined his arguments against the findings of the Election Tribunal on the Issues Nos. 1 and 2.

5. The learned counsel appearing for the petitioners contended that non-mention of ward number or wrong mention of serial number in the voters' list of the candidate concerned was a substantial error and therefore, such a substantial error was not required to be brought to the notice of the concerned candidate or his proposer and the Returning Officer was, therefore,

perfectly justified in rejecting the nomination papers of these candidates. It was further contended that when the validity of election was called in question under sub-section (4) of Section 31 of the said Act on the ground of any error committed by an officer charged with carrying out the rules made under Section 274 of the Act or on the ground of an irregularity or informality not corruptly caused, the Judge cannot set aside the election as laid down by sub-section (4) of section 31. The learned counsel finally contended that the operative portion of the order of the Election Tribunal directing that election to the office of Upa-Sarpanch should not be held until candidates from the three wards in question were elected was beyond the scope of the election petitions.

5.1 In support of his contentions, the learned counsel for the petitioners relied upon the following judgements :

[a] The decision of the Supreme Court in Narbada Prasad v. Chhaganlal and others reported in AIR 1969 SC 395, was cited for the proposition that if a thing is to be done in a particular manner, it must be done in that manner or not at all. Other modes of compliance are excluded (paragraph 5 of the judgement). In that case, a candidate, who was elector of a different constituency, had merely produced certificate from officer who was not authorized to issue certified copy of electoral roll and had thus not complied with the requirements of valid nomination paper. The Court held that the rejection of the nomination paper by the returning officer was justified, because, there was no compliance with the provisions of section 33(5) of the Representation of the People Act, 1951 and there was no power in the Court to dispense with the requirement.

[b] The decision of the Supreme Court in Dharam Singh Rathi v. Hari Singh, reported in AIR 1975 SC 1274, was cited to point out that the Supreme Court upheld the decision of the returning officer rejecting the nomination paper of the candidate (Jaga Nath) on the ground that he had not given the name of his father and his full address. It will be seen from the said decision that the returning officer had described the said error as a technical error fit to be rectified, but because there was nobody present on behalf of the candidate at the time of the scrutiny of the

nomination papers, the rectification could not be made and the nomination papers came to be rejected.

[c] The decision of the Supreme Court in Brij Mohan v. Sat Pal, reported in AIR 1985 SC 847, was cited for the proposition that the candidates and the proposers are always expected to go fully prepared to meet any objection that may be raised by any candidate or even by the returning officer himself suo motu at the time of the scrutiny and they cannot be expected to go anytheless prepared merely because the returning officer had received the nomination paper without raising any objection. It was held that there was no estopple in regard to the statutory duty of scrutiny against the returning officer. It will be seen that the Supreme Court also held:

"It is not possible to say generally and in the abstract that all errors in regard to electoral roll numbers of the candidate and the proposer in the electoral rolls or nomination papers do not constitute defects of a substantial characters. They would not be defects of a substantial character only if at the time of the scrutiny the Returning Officer either by himself with the material placed before him during the scrutiny or with the assistance of the candidate or his proposer or any other person is able to find out the correct serial number of the candidate and the proposer by reference to the correct part number of the electoral roll."

6. The learned counsel appearing for the respondents have supported the reasoning of the Election Tribunal in all these matters.

7. It will be seen that there was an error of non-mention of ward number in two matters and a wrong mention of serial number of a candidate in one matter and in context of these facts, the learned counsel for the petitioners has contended that the nomination forms of these candidates were rightly rejected by the returning officer under Rule 15(2) of the Gujarat Panchayats Election Rules, 1994 since there was failure to comply with the provisions of Rule 12 which required a nomination paper to be filled in as per the prescribed Form 4. Non-compliance of the provisions requiring the nomination to be filled in in the prescribed form clearly entailed rejection of the nomination form, argued the

learned counsel.

8. The relevant provisions of sub-rule (3) and sub-rule (4) of Rule 12 and sub-rule (2)(c) and sub-rule (4) of Rule 15 of the said Rules, which fall for our consideration, read as under :

"12. Presentation of nomination papers and requirement for valid nomination -

(1) xxxxx

(2) xxxxx

(3) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and numbers in the list of voters of the candidate and his proposer as entered in the nomination paper are the same as those entered in the list of voters, and if not, invite the attention of the candidate or the proposer as the case may be, to this effect:

Provided that the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them in conformity with the corresponding entries in the list of voters.

(4) Where a candidate is a voter in a different electoral division, a copy of the list of voters of that division or of the relevant part thereof or a certified copy of the relevant entries in such list shall, unless it has been filed alongwith the nomination paper, be produced before the returning officer at the time of the scrutiny.

(5) xxxxx

(6) xxxxx

15. Scrutiny of nomination papers -

(1) xxxxx

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion after such summary inquiry if any, as he thinks necessary, reject any nomination paper on any of the following grounds, namely,

(a) xxxxx

(b) xxxxx

(c) that there has been a failure to comply with any of the provisions of rule 12 or 13; or

(d) xxxxx

(3) xxxxx

(4) The returning officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character.

Explanation - For the purposes of this sub-rule, a failure to complete, or a defect in completing the declaration, as to symbols in nomination paper in Form 4 shall not be deemed to be defect of a substantial character.

(5) xxxxx "

9. It will be seen from the provision of Rule 12(3) that a duty is cast upon the returning officer, on the representation of a nomination paper, to verify that the names and numbers in the list of voters, of the candidate and his proposer, are correctly entered in the nomination paper. From the prescribed Form 4, it is clear that several blanks are required to be filled in by giving names and numbers as required. Verifying names and numbers in the nomination paper would be an important process of scrutinising the nomination paper and is an essential part of the duty of the returning officer who is entrusted the task of scrutiny of the nomination papers.

9.1 Sub-rule (3) of Rule 12 enjoins a duty on the returning officer to invite the attention of the

candidate or the proposer, if there is discrepancy in the names or numbers appearing in the nomination paper when they do not tally with the names and numbers in the list of voters; and if such discrepancy is due to clerical or technical error in the nomination paper, the returning officer is required to permit the names or numbers to be corrected in order to bring them in conformity with the corresponding entries in the list of voters. Therefore, when technical errors are noticed in the nomination papers as regards the names or numbers in the list of voters, the returning officer has a duty of inviting the attention of the candidates to such technical errors and to allow them to correct them. The scrutiny is required to be done on the date fixed for scrutiny, as provided by Rule 15, in presence of the candidates or their election agents and since the examination of the nomination papers is regulated as per the provision of Rule 15, duty to invite the attention of the candidate or the proposer as regards the discrepancy in the nomination paper in names or numbers would arise only during scrutiny, if the candidate or his election agent is available for taking such intimation or carry out the corrections as per the proviso to sub-rule (3) of Rule 12. As soon as the correction of technical error is allowed and carried out as per Rule 12(3), the question of rejection of such nomination paper, on such ground, under Rule 15(2)(c) will not survive. However, if the correction is not carried out despite intimation or the candidate or his election agent is not present at the time of scrutiny and there is failure to comply with the provisions of Rule 12, the returning officer would be justified in rejecting the nomination paper under sub-rule 2(c) of Rule 15.

10. In the present case, admittedly all the three candidates whose nomination papers came to be rejected were present all throughout the day on 19th March 2002 being the date on which the nomination papers were scrutinised as found by the Tribunal in all the cases. The returning officer never brought the omissions of numbers of the ward or wrong mention of the serial number of the candidate in voters' list to the notice of such candidates or their proposers on the presentation of the nomination papers, as was required to be done under Rule 12(3) of the said Rules. The returning officer has, in his affidavit, tried to justify his failure to invite the attention of the candidate or the proposer to the omission of the number of ward or the wrong mention of the serial number of the candidate to the respective candidates on the ground that these errors were not technical errors, but were substantial errors. In his affidavit-in-reply filed in the election petition, a copy

of which is on record, it has been stated by the returning officer in paragraph 6 that no such opportunity to rectify the error was given to the candidates, because, according to him, the errors in their nomination papers were of substantial nature and were not merely technical errors. In paragraph 5 of the affidavit-in-reply, he stated that he had no option but to reject their nomination papers since the errors were not of merely technical nature.

11. The contents of the nomination paper prescribed under Rule 12(1) of the Rules would disclose as to for which office the candidate named therein was offering to contest. It would disclose his name and address as per the particulars sought in the form. Moreover, it would show candidate's serial number in the list of voters of the relevant electoral division for which it is entered. It would also disclose the proposer's name, address and serial number of the list of voters in the relevant electoral division. Other particulars such as age of the candidate, his being sponsored by the a political party, symbol etc. are also required to be mentioned for the purpose of Rule 12. We are concerned only with the names and serial numbers required to be filed in the nomination form. Serial numbers in the list of voters as well as number of electoral division are required to be mentioned in the relevant blanks of the form. The names of the proposer and the candidate are obviously required to be mentioned. The idea underlying such information which is required to be given in the nomination paper is to ascertain who is the candidate, whether the candidate is properly proposed, whether he is eligible to contest the election, whether his identity is duly borne out from the particulars which are required to be given in the form on comparing them with the authentic record in form of voters' list at the time of scrutiny. In cases where a candidate is a voter in different electoral division, a copy of the list of voters of that division or of the relevant part thereof or certified copy of the relevant entries in such lists are required to be produced before the returning officer at the time of scrutiny unless they are already filed alongwith the nomination paper, as provided by sub-rule (4) of Rule 12.

12. In the present case, it appears that in respect of the respondent - candidates who were contesting in a different electoral division, the requisite material was available before the returning officer, as envisaged by Rule 12(4). Therefore, non-mention of electoral division in the nomination paper where the space was kept blank was, in the facts of the present case, only a technical

error which could have been rectified with reference to the documents which were placed alongwith the nomination paper or were available at the time of scrutiny as per Rule 12(4), because, the documents including certified copy contemplated by sub-rule (4) of Rule 12 would authentically indicate the electoral division to which the candidate belonged. Even the error in writing serial number of the candidate as 103 instead of 73 was an obvious error which could have been rectified on the spot, because, the concerned candidate was present all throughout the day at the time of scrutiny. All other particulars in the nomination form were duly stated and were sufficient to establish the identity of the candidates concerned. The returning officer clearly failed in his statutory duty by not drawing the attention of the candidates concerned about the above technical errors which could have been rectified on the spot at the time of scrutiny. As held by the Supreme Court in Pratap Singh v. Shri Krishna Gupta, reported in AIR 1956 SC 140, it is the substance that counts and must take precedence over mere form. The Supreme Court deprecated the tendency of the Courts towards technicality, holding that some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which is which, judges must determine the matter and exercise a nice discrimination, sort out one class from the other along broad based, common sense lines.

13. When provisions of sub-rule (3) of Rule 12 enjoin a duty on the returning officer to draw the attention of the candidate or the proposer to the discrepancy in names and numbers occurring in the nomination paper, it is obvious that such discrepancy of a technical nature cannot be a ground for rejecting the nomination paper when the candidate concerned or the proposer is prepared to rectify the clerical or technical error on being given such opportunity. The returning officer should not reject the nomination paper merely on a mistake of technical or formal nature in cases where the identity of the candidate can be ascertained by him on the material made available to him. He should also give an opportunity to the candidate or his representative present at the time of scrutiny to remove the defect when such candidate or his representative is present.

13.1 In Ram Awadesh Singh v. Sumitra Devi, reported in (1972) 3 SCC 131, in context of the provisions of

Sections 33(4) and 36(4) of the Representation of the People Act, 1951, the Supreme Court held that, from a combined reading of Sections 33 and 36, it was clear that a misdescription as to electoral roll number of the candidate or of the proposer in the nomination paper was not to be considered as a material defect in the nomination paper. The very fact that the law requires the returning officer to look into the nomination paper, when filed and get any mistake regarding the name or electoral number of the candidate or his proposer corrected, shows that the mistake regarding them was not a material defect.

13.2 The Constitutional Bench in Karnail Singh v. Election Tribunal, Hissar, reported in 10 ELR 189, in context of omission to mention the name of sub-division in the nomination forms and the provisions of Sections 33(2) and 36(4) of the Representation of the People Act, 1951, held that the defect was a technical one and the Tribunal was perfectly right in holding that the defect was not of a substantial character and that the nomination paper should not have been rejected.

13.3 In Smt.Navuba Gokalji Chavda v. The Returning Officer and others, reported in XXIII(2) GLR 397, the learned Single Judge of this Court, in a case where the nomination form which gave all other details but missed to state serial number of the candidate in the voters' list, held that the defect about mentioning or non-mentioning of electoral roll numbers in nomination form was not considered by the legislature to be a defect of substance for major elections like Parliament and Assembly elections and hence, much less can it be said that for the election to local body like the Gram Panchayat, such defect would stand elevated to the pedestal of a substantial defect. The Court held that the returning officer was not justified in rejecting the nomination form of the petitioner only on the ground that serial number in the voters' list was not mentioned by the petitioner in her nomination form. It was an error of technical nature which could have been got corrected and, in any case, it cannot result in vitiation of the nomination form as such.

14. In the present case also, if the returning officer had drawn the attention of these candidates to the discrepancies in their nomination papers, they would have been easily rectified on the spot and the nomination papers could not, in such an event, have been rejected in view of the clear mandate contained in sub-rule (4) of Rule 15 that the returning officer shall not reject any

nomination paper on the ground of any technical defect which is not of a substantial character. The contention that the provisions of sub-rule (4) of Rule 15 will apply, having regard to the explanation below it, only to cases of defects relating to symbols in the nomination papers is required to be merely stated for the purpose of rejection. If such contention is accepted, the explanation to sub-rule (4) of Rule 15 would make the provision of the sub-rule (4) redundant. The sub-rule (4) of Rule 15 clearly contemplates all the technical defects which are not of a substantial character and the explanation only adds to that class by a deeming fiction that the defects as to symbols in nomination papers shall not be deemed to be defects of a substantial character. In other words, it adds to the ambit of sub-rule (4) of Rule 15 and does not subtract anything therefrom. Whether the ground on which the nomination paper is rejected is a ground of any technical defect or not, would depend on the facts of each case whenever the returning officer exercises discretion during scrutiny to decide whether the defect is of a technical nature or not. In context of the defects for which the provisions of the Rules give no such discretion and require the nomination form to be rejected, the ground for rejection would by its very nature be of a substantial character.

15. For the foregoing reasons, we find ourselves in complete agreement with the reasoning given by the Tribunal for reaching the findings on Issues Nos. 1 and 2 and in holding that the returning officer committed an error in rejecting the nomination papers of these three candidates.

15.1 The Election Tribunal was, therefore, justified in setting aside the election of the petitioners of these three matters, because, under sub-section (3) of Section 31, it is empowered to pass an order confirming or amending the declared result or setting the election aside. The rejection of the nomination papers of the three candidates resulted in declaring the petitioners as elected, without contest, in the three wards from which they had offered their candidature during the election, since there was no other candidate in the fray in these wards. Therefore, the rejection of the nomination papers of the respondents - candidates materially affected the result of the election of these three wards. If their nomination papers had not been rejected, on the returning officer's following the mandate of Rule 12(3), then the petitioners obviously would not have been declared elected without contest. Thus, the declaration of the result of their being elected uncontested would not have

come, because, the contest would have taken place if the nomination forms of these three candidates had not been rejected. The result of the election was, thus, materially affected by wrongful rejection of the nomination papers of these three candidates. In fact, whenever the nomination paper of any candidate is wrongly rejected and the election has taken place, the result of the election would be materially affected on the Election Tribunal finding that the nomination papers were wrongfully rejected, because, on holding that the papers of such candidates were wrongly rejected, he would have become entitled to contest the election, and it cannot be said with certainty that the result declared would have been the same even if the candidates whose nomination papers were rejected, were allowed to contest. However, in the present case, we are concerned only with a situation where all the petitioners were declared elected without contest in view of the rejection of the nomination papers of the respondent - candidates, and in such a situation, it can confidently be said that the result of the election was materially affected by virtue of the wrongful rejection of their nomination papers. Therefore, there is no substance in the contention that the Judge ought not to have set aside the election of the petitioners in view of the provisions of sub-section (4) of Section 31. The present case clearly falls in the explanation to sub-section (4) of Section 31 of the Act. The Election Tribunal was, therefore, justified in setting aside the election of the petitioners.

16. Section 31 of the said Act, however, does not empower the Tribunal to issue any further directions which are not consequential to the validity of the election decided upon by the Tribunal. The direction that the election of Upa-Sarpanch should not be held, could not have been issued while disposing of the matter under Section 31(3) of the said Act. The Panchayat was constituted and even the first meeting was held. Therefore, ordinarily, as per the provision of Section 51(1), the election of Upa-Sarpanch would have taken place from amongst the members of the Panchayat. The election to the office of Upa-Sarpanch was required to be held as per the provisions of Section 51 read with the provisions of the Gujarat Village Panchayats (Upa-Sarpanch) Election Rules, 1994 and the Election Tribunal was not required to give any direction as regards the holding of the election of Upa-Sarpanch. None of the learned counsel who appeared for the rival parties supported that part of the direction given by the Tribunal. The direction of the Tribunal in the impugned orders which prevents holding of election to the office

of Upa-Sarpanch is, therefore, hereby set aside in all the impugned orders. Rest of the impugned orders are upheld.

17. For the foregoing reasons, except to the above limited extent of setting aside the direction relating to the election to the office of Upa-Sarpanch, we do not find any substance in these petitions. All the petitions are, therefore, rejected. Rule is discharged in each of them with no order as to costs.

In view of the above order, all the Civil Applications also stand rejected.

[R.K.ABICHANDANI, J.]

[K.M.MEHTA, J.]

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